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IN THE SUPREME COURT OF THE UNITED STATES

WESLEY J. MOTLEY, III

Petitioner

v.

THE DEPARTMENT OF THE NAVY

Respondent

ON WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LOWER COURT CASE NUMBER: 08-3143

BRIEF FOR THE PETITIONER

The petitioner respectfully prays in the compelling interest of justice that a writ of certiorari be issued to review a published opinion and mandate from the United States Court Of Appeals for the Federal Circuit which affirmed the Board's final decision which constituted an abuse of discretion.

QUESTIONS PRESENTED

1. Should the U.S. Court of Appeals for the Federal Circuit's judgment be overturned by incorrectly affirming a Full Board decision after the Board's Administrative Judge did not consider any of the mitigating Douglas Factors in the petitioner's termination as expressly held by the MSPB and is not part of the administrative record and that the agency failed to consider any mitigating Douglas Factors and did not include Douglas in their Discharge Letter or as part of the administrative record which constitutes "an abuse of discretion".

2. Whether the U.S Court of Appeals incorrectly affirmed the Board's decision upholding the petitioner's termination when the agency failed to prove that petitioner actually committed the alleged misconduct or that the agency failed to conduct an independent investigation to hear petitioner's side of the story as a matter of law before taking the adverse action and can the employer escape liability when the casual link of the "cat's paw" or subordinate animus is not broken without an independent investigation.

3. Whether the U.S. Court of Appeals for the Federal Circuit erred in finding that several derogatory remarks made by a biased subordinate about the petitioner's veterans preference and his protected veterans status as "legally irrelevant" under USERRA and in the compelling purpose that Congress intended the statute to be construed.

STATEMENT OF CASE AND FACTS

On September 19, 2005, the petitioner was given a Career Conditional Appointment as an Office Automation Assistant, GS-5, with the Department of the Navy, Great Lakes, Illinois. The appointment was subject to a one year probationary period beginning on the aforementioned date. Prior to the completion of the probationary period the Appellant was discharged effective July 14, 2006. On August 10, 2006, the Petitioner filed an appeal of his termination action claiming his termination violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). On October 25, 2006, the Petitioner filed a

motion that his appeal be dismissed without prejudice stating that the case was referred to the Office of Special Counsel ("OSC") Investigation for further inquiry. Motley v. Department of the Navy. MSPB Docket No. CH-3443-Q6-07 36-1-1 (Initial Decision October 26, 2006), The OSC failed to take action Aug-24-2007 into the Petitioner's complaint. The Petitioner re-filed his appeal with the Merit Systems Protection Board ("MSPB") on May 7,2007. On June 27,2007, the AJ dismissed the Petitioner's appeal for lack of jurisdiction and denied his request for corrective action under USERRA. On August 1, 2007, the Petitioner submitted an appeal of the AJ's Initial Decision. Petitioner is appealing the judgment of the US Court of Appeals for the Federal Circuit which affirmed the Full Board decision June 6, 2008. Petitioner was working as an Office Automation Assistant when another coworker informed the petitioner that he was scheduled to work in the agency's "Documatch" section for two consecutive months. All other coworkers had 2 and 3 moth intervals between there scheduled assignments. On July 3, 2006, the petitioner sent Leanne Moore ("agency supervisor") a polite email stating that he was assigned to "Documatch", (a mailroom type atmosphere) for three consecutive months. "Documatch" is an assignment where the employee leaves his regular desk and reports to the 'mailroom' for the entire month. All other employees similarly situated, but none were veterans had 2 and 3 month intervals in their schedule the petitioner had none. When the petitioner visited the supervisor's office after politely knocking on her door, the supervisor became very hostile, and even apologized for her behavior later the day of July 5, 2006. After that, the petitioner contacted the agency's Human Resources Office ("HRO") to inform them of the incident, the HRO representative instructed the petitioner to contact the agency's executive secretary and obtain information on "How to file an Administrative Grievance". This was in response to the hostile treatment that the petitioner had been receiving from Leanne Moore ("agency supervisor") since she had become his supervisor, approximately 2-3 months after September 19, 2005 after the petitioner began working at the agency. On the afternoon of July 5, 2006, the supervisor called the petitioner into her office and told the petitioner that she saw the administrative grievance on his desktop computer monitor, and said - "I saw the grievance on your PC and you have to do that on your own time." The agency supervisor named in this action was not the supervisor at the time the petitioner was hired at the agency and made it very clear that the petitioner was not welcome at the agency through not only derogatory remarks regarding his veterans preference and veterans status but that she was also very abrupt and discourteous on several occasions. The agency stated in their Discharge Letter of July 13, 2006 that all coworkers performed at 120% is fabricated and petitioner repeatedly asserted that all his coworkers were not performing even at his level, and that coworker Leslie Tubbs was in tears when she received her performance evaluation, yet she was not terminated. The petitioner also asserted that another employee never came to work and her performance evaluation was poor. A reasonable fact-finding will undoubtedly disprove the agency's falsified claim in its specific reasons for discharging the petitioner, and the petitioner contends that the agency's proffered reasons for his discharge was the supervisor's discriminatory animus.

SUMMARY OF ARGUMENT

In an agency removal action based on employee misconduct, the agency must make the following determinations: (1) that the employee actually committed the alleged misconduct; (2) that there is a nexus between the misconduct and the efficiency of the service; and (3) that the penalty imposed is appropriate in light of the misconduct. (Quoting) Parsons v. United States Dep't of the Air Force, 707 F.2d 1406, 1409 (D.C.Cir.1983). The standard of review is embodied in 5 U.S.C. Sec. 7703(c), "which provides that this court shall review the record and hold unlawful any agency action which we find to be arbitrary, capricious, or an abuse of discretion; procedurally defective; or unsupported by substantial evidence. See Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed.Cir.1984). See D.E. v. Department of the Navy, 721 F.2d 1165, 1166 (9th Cir.), modified, 722 F.2d 455 (9th Cir.1983). See Young v. Hampton, 568 F.2d 1253, 1257, 1264 (7th Cir.1977); Also see Douglas v. Veterans Administration, 5 MSPB 313, 329 (1981). "The agency has the burden of persuasion regarding these three elements of its decision and is therefore obligated to present evidence to the Board necessary to support each element." The scope of review for the U.S. Court of Appeals for the Federal Circuit ("court") in an appeal from a decision of the Board is limited. "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c).

See VanFossen v. Dep't of Housing & Urban Dev., 748 F.2d 1579, 1581 (Fed. Cir. 1984) ("failure to consider a significant mitigating circumstance constitutes an abuse of discretion").

ARGUMENT

In the agency removal action based on alleged employee misconduct, the agency failed to establish these 3 required elements, in particular, that:
(1) the employee actually committed the alleged misconduct; . . . in the present case, the agency never conducted any independent investigation and failed to prove the charged misconduct. (2) a reasonable factfinder will conclude that there cannot exist a nexus between the misconduct and the efficiency of the service - if the agency failed to prove that the misconduct occurred. (3) in regards to the agency's penalty imposed as appropriate in light of the alleged misconduct, the petitioner argues that in Parsons v. Department of the Air Force, 707 F.2d 1406, the government argued that Parsons may not raise the issue of Douglas for the first time on appeal. The government also contended that even if Parsons may raise the issue of Douglas, the Air Force's decision to discharge Parsons is not arbitrary, capricious, or an abuse of discretion because it promoted the efficiency of the service and is an appropriate penalty for Parsons' misconduct. In light of its decision in Douglas v. Veterans Administration, 5 MSPB 313 (1981), the case was remanded to the MSPB for further consideration. The MSPB requires that agencies consider Douglas in all their removal actions; this was not the case in Motley v. Department of the Navy MSPB Docket No. CH-3443-Q6-07 36-1-1 (Initial Decision October 26, 2006). In Douglas v. Veterans Administration, 5 MSPB at 334. "The MSPB reviews agency personnel actions so that, inter alia, they will not be declared arbitrary, capricious, an abuse of discretion, not in accordance with law, procedurally incorrect, or unsupported by substantial evidence when reviewed by appellate courts under 5 U.S.C. Sec. 7703(c). Douglas v. Veterans Administration, 5 MSPB at 328. Thus, to assure that agency penalty decisions will meet the requirements of Sec. 7703(c), "the Board must ... review the agency's penalty selection to be satisfied (1) that on the charges substantiated by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty 'was based on a consideration of the relevant factors and [that] ... there has [not] been a clear error of judgment.' 8 Id.," quoting Citizens to Protect Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). In light of Douglas v. Veterans Administration, 5 MSPB at 334., this case precludes the grant of judgment for the respondent. There was no review of any mitigating circumstances under the Douglas Factors regarding any of the charges in the petitioner's termination, there was no discussion with the petitioner and Douglas is not part of the administrative record, these facts constitute an abuse of discretion. Also, it is undisputed that the agency ever conducted an independent investigation and no such investigation or any consideration of Douglas is part of the record. The record also supports a finding that the agency supervisor's adverse actions caused Petitioner's discharge. The matter was reported to the decisionmaker only as a result of the supervisor's actions. The decision-maker relied entirely on a subordinate's biased report in terminating the petitioner. Furthermore, the agency's failure to undertake a meaningful "independent investigation" of the incidents or charges against the Petitioner and not even asking the Petitioner to explain his side of the story, along with the USERRA claim that the agency supervisor held a discriminatory bias against the petitioner presents case circumstances substantially similar to BCI Coca-Cola Bottling Co of Los Angeles v. EEOC, 06-341. The court departed from the essential requirements of the law in its Judgment. The Board failed to consider any of the mitigating circumstances contained in the Douglas factors and is not part of the administrative judge's analysis in the initial decision, not included in the Discharge Letter issued to the petitioner or are any mention of the Douglas Factors part of the administrative record. The Department of the Navy, as required by law, did not take into account any of the mitigating factors listed in the 'applicable regulations' contained in their own "**Department of the Navy Civilian Human Resources Manual Subchapter 752 –Dec. 2003, (under) Disciplinary Actions: Appendix (C) -Factors to be Considered in Selecting the Appropriate Adverse Action (the "Douglas Factors")."** See p 40 "*The decision notice should explain what weight was given to those [Douglas] factors.*" (emphasis added)
The Department of the Navy did not consider any Douglas Factors and was not included in the agency's Discharge Letter of July 13, 2006 to the petitioner as required by law. See VanFossen v. Dep't of Housing & Urban Dev., 748 F.2d 1579, 1581 (Fed. Cir. 1984) ("failure to consider a

significant mitigating circumstance constitutes an abuse of discretion"). In not assessing the penalty for the petitioner's alleged misconduct and not considering any mitigating circumstances pursuant to Douglas, and not proving that the petitioner even engaged in the alleged misconduct, the MSPB's decision must be set aside as arbitrary, capricious, and an abuse of discretion. The MSPB departed from the essential requirements of the law in its decision and failed to consider any of the mitigating circumstances contained in the Douglas Factors and is not part of the administrative judge's analysis in the initial decision, not included in the Discharge Letter or part of the administrative record. See VanFossen v. Dep't of Housing & Urban Dev., 748 F.2d 1579, 1581 (Fed. Cir. 1984) ("failure to consider a significant mitigating circumstance constitutes an abuse of discretion"). The Court departed from the essential requirements of the law in its Judgment. Other than the fact that the agency and Board did not consider any Douglas Factors or any significant mitigating circumstances, this case is strikingly similar to the facts in BCI Coca-Cola Bottling Co. v. EEOC 06-341, the complaints presented in the petitioner's case under examination raises a similar point of law and because the agency's harmful procedure in the petitioner's discharge involved in this case is similar to the issues in BCI Coca-Cola Bottling Co. v. EEOC 06-341. In EEOC v. BCI Coca-Cola Bottling Co., 06-341, for example, the BCI court's holding that a "good faith independent investigation" breaks the chain of causation between the supervisor's bias and the decision-maker's termination decision." The BCI court also held that "only a cursory examination did not constitute a sufficiently independent investigation as a matter of law." In this present case, the petitioner asserts a complaint similar to BCI Coca-Cola Bottling Co. v. EEOC in that: (1) the agency failed to conduct an independent investigation in the case of the alleged charges against the petitioner, not even a cursory examination, and never proved the petitioner's alleged misconduct actually occurred - an important element required by law; (2) the agency failed to include the petitioner's version of the story, and; (3) the petitioner filed a nonfrivolous claim that the supervisor (subordinate) held a bias against him, more importantly, the only difference in the instant case is that the US Court of Appeals upheld the initial and final decision of the MSPB after the agency and the Board failed to consider any of the Douglas Factors as required by law, see Douglas v. Veterans Administration, 5 MSPB at 334. "The MSPB reviews agency personnel actions so that, inter alia, they will not be declared arbitrary, capricious, an abuse of discretion, not in accordance with law, procedurally incorrect, or unsupported by substantial evidence when reviewed by appellate courts under 5 U.S.C. Sec. 7703(c). Douglas v. Veterans Administration, 5 MSPB at 328. "Thus, to assure that agency penalty decisions will meet the requirements of Sec. 7703(c), "the Board must ... review the agency's penalty selection to be satisfied (1) that on the charges substantiated by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty 'was based on a consideration of the relevant [Douglas] factors and [that] ... there has [not] been a clear error of judgment.' 8 Id.," (quoting) Citizens to Protect Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). The agency's penalty selection did not include any Douglas Factors in the Discharge Letter or anywhere on the administrative record as required by law. "The charges against petitioner appeared to be "serious" if one looks only at the labels given to them: 'disrespectful conduct towards a supervisor.' However, to determine the actual nature of the charge, the Courts must examine the underlying conduct giving rise to the charge, not merely the label." See, e.g., Stockton v. Department of Transp., 7 MSPB 539." The MSPB did not analyze the removal penalty in light of any of the 12 factors enumerated in *Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981)*, applicable to the facts of this case. The MSPB determined that the removal action was "appropriate and reasonable under other circumstances and not based on any of the "12 Douglas Factors", which the Board holds that all Administrative Judges must consider in any removal case. The AJ did not identify, balance or consider any relevant Douglas factors in determining whether the sustained charge[s] warranted the penalty imposed, and that the agency failed to first prove the charge(s). In light of Douglas v. Veterans Administration, 5 MSPB at 334, this case precludes the grant of judgment for the respondent. There was no review of any mitigating circumstances under the Douglas Factors regarding any of the charges in the petitioner's termination, there was no discussion with the petitioner and Douglas is not part of the administrative record, these facts constitute an abuse of discretion. It is undisputed that the agency never conducted an independent investigation and is not part of the record. The record also supports a finding that the agency supervisor's adverse actions caused the petitioner's discharge. The matter was reported to the decisionmaker only as a result of the supervisor's

actions. As in BCI Coca-Cola Bottling Co. v. EEOC, the decisionmaker relied entirely on a subordinate's biased report in terminating the petitioner. Furthermore, exactly like in BCI, here the agency failed to undertake a meaningful "independent investigation" of the incidents or charges against the petitioner and did not even allow the petitioner to explain his side of the story. Along with his USERRA claim that the agency supervisor held a discriminatory animus towards the petitioner presents case circumstances substantially similar to BCI Coca-Cola Bottling Co of Los Angeles v. EEOC, 06-341. The factors set forth in Douglas v. Veterans Administration, 5 MSPB 313, 331-32 (1981), provide guidance in determining the appropriate penalty for a particular case. Hayes v. Department of the Navy, 727 F.2d 1535, 1540 (Fed.Cir.1984). Although "the Board is not required to articulate irrelevant [Douglas] Factors , . . . failure to consider a significant mitigating circumstance constitutes an abuse of discretion." VanFossen v. Department of Hous. & Urban Dev., 748 F.2d 1579, 1581.

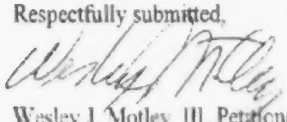
MITIGATING FACTORS AND CIRCUMSTANCES NOT CONSIDERED BY AGENCY OR ADMINISTRATIVE JUDGE IN LIGHT OF DOUGLAS v. VETERANS ADMINISTRATION, 5 MSPB 313 (1981) CONSTITUTES AN ABUSE OF DISCRETION

The administrative judge's failure to discuss petitioner's exemplary disciplinary and work record indicates that she did not consider any mitigating Douglas factors. The administrative judge also failed to consider any additional significant mitigating factors, for example, (1.) the administrative judge did not consider whether petitioner exhibited a potential for rehabilitation; (2.) the administrative judge did not consider that "a lesser penalty may also have been appropriate and deter similar future conduct; (3.) the administrative judge's failure to determine whether the petitioner's alleged misconduct was intentional or merely the result of poor judgment; (4.) another mitigating circumstance to be considered according to *Douglas at No. 11 - "Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter;"* In the case of the petitioner and pursuant to Code of Federal Regulation on Reasonable Accommodation. Title 29, Section 1613.704 (a)(5)(quoting) - " Is regarded as having such an impairment means has a physical or mental impairment that does not substantially limit major life activities;" An independent investigation in conjunction with the required review of any mitigating circumstances as outlined in the 12 Douglas Factors would have determined that the petitioner had a significant mitigating circumstance. The petitioner did during his employment at the agency from September 19, 2005 until July 14, 2006 and still receives professional treatment for a "mental impairment", after being diagnosed in 2003, (available upon consent to release of information), and pursuant to The U.S. Department of Health and Human Services ("HHS") Privacy Rule to implement the requirement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Privacy Rule standards address the use and disclosure of individuals' health information—called "protected health information" by organizations subject to the Privacy Rule — called "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used. The Office for Civil Rights ("OCR") is responsible for implementing and enforcing the Privacy Rule with respect to voluntary compliance activities and civil money penalties.

CONCLUSION

In light of Douglas v. Veterans Administration, 5 MSPB at 334, this case precludes the grant of judgment for the respondent.

Respectfully submitted,



Wesley J. Motley, III, Petitioner, Pro se

CERTIFICATE OF SERVICE

I certify that a copy of the Motion, Affidavit and Writ of Certiorari was sent December 27, 2008 by Federal Express to:

The attorney for the respondent, at the following address:

Robert C. Bigler, Trial Attorney
Commercial Litigation Branch,
Civil Division Classification Unit
U.S. Department of Justice
1100 L Street, N.W., Room 12066
Washington, DC 20530
(202) 307-0315

I certify that a copy of the Motion, Affidavit and Writ of Certiorari was sent December 27, 2008 by Federal Express to:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

An original and 40 copies of the Motion, Affidavit and Writ of Certiorari were sent December 27, 2008 by Federal Express to:

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000

INDEX TO APPENDICES

Wesley J. Motley, III v. The Department of the Navy

Lower Court Case No. 08-3143

APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3143

WESLEY J. MOTLEY, III

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

Petition for review of the Merit Systems Protection Board in CH3443060736-I-2.

DECIDED: June 6, 2008

Before SCHALL and PROST, Circuit Judges, and WARD, District Judge.*

PER CURIAM.

DECISION

Wesley J. Motley petitions for review of the final decision of the Merit Systems Protection Board ("Board") that (1) dismissed his appeal of his removal for lack of jurisdiction and (2) denied his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), codified at

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* Honorable T. John Ward, District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

38 U.S.C. §§ 4301-4333. Motley v. Dep't of the Navy, No. CH-3443-06-0736-I-2 (M.S.P.B. Dec. 4, 2007) ("Final Decision"). We affirm.

DISCUSSION

I

Mr. Motley was hired by the Department of the Navy ("agency") on a career-conditional appointment to the position of Office Automation Assistant, GS-5, effective September 19, 2005, subject to the completion of a one-year probationary period beginning on that same date. On July 13, 2006, before the probationary period had expired, Mr. Motley received a memorandum terminating his employment, effective July 14, 2006, based on unsatisfactory work performance, including his failure to complete assigned tasks in a timely manner, failure to carry out a proper work assignment, and disrespectful conduct.

In August of 2006, Mr. Motley filed an appeal with the Board, alleging that this termination violated his rights under USERRA. In October of 2006, the administrative judge ("AJ") to whom the appeal was assigned issued an initial decision dismissing the appeal without prejudice, so that Mr. Motley could pursue his USERRA claim before the Office of Special Counsel ("OSC"). Motley v. Dep't of the Navy, No. CH-3443-06-0736-I-1 (M.S.P.B. Oct. 26, 2006). In May of 2007, after OSC had closed its inquiry into Mr. Motley's USERRA complaint, he refiled his appeal with the Board, alleging improper termination and violation of his rights under USERRA.

In an initial decision, the AJ (1) dismissed Mr. Motley's termination appeal for lack of jurisdiction because he had been removed during his probationary period for reasons not related to partisan politics or his marital status, and (2) denied his claim for

corrective action under USERRA. Motley v. Dep't of the Navy, No. CH-3443-06-0736-I-2 (M.S.P.B. Jun. 27, 2007) ("Initial Decision").

First, with respect to jurisdiction, the AJ noted that an appellant may establish jurisdiction by showing that he is an "employee," defined by 5 U.S.C. § 7511(a)(1)(A) to include an individual in the competitive service who is not serving a probationary or trial period under an initial appointment. See McCormick v. Dep't of the Air Force, 307 F.3d 1339, 1341 (Fed. Cir. 2002). To meet this definition, Mr. Motley could receive credit for prior service in a competitive service position if he could show that (1) his prior service was rendered immediately preceding the appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than thirty days. See 5 C.F.R. § 315.802(b). During a June 2007 conference, Mr. Motley conceded that although he had completed several years of prior service, that service was separated from his current position by a period of greater than thirty days. Accordingly, he was a probationary employee at the time of his termination. Because the Board retains jurisdiction over appeals involving probationary employees terminated for post-appointment reasons only when there is a nonfrivolous allegation of discrimination based on partisan political reasons or marital status, see Stokes v. Fed. Aviation Admin., 761 F.2d 682, 685 (Fed. Cir. 1985), and because Mr. Motley had alleged discrimination based solely upon his prior military service rather than partisan politics or marital status, the AJ dismissed his termination appeal for lack of jurisdiction. Initial Decision at 4.

Second, with respect to Mr. Motley's USERRA claim, the AJ noted that Mr. Motley had established the requirements for Board jurisdiction over his appeal, including

(1) performance of duty in a uniformed service of the United States; (2) an allegation of a loss of employment benefit; and (3) an allegation that the benefit was lost due to the uniformed service. See Yates v. Merit Sys. Prot. Bd., 145 F.3d 1480, 1484 (Fed. Cir. 1998). After concluding that the Board possessed jurisdiction over Mr. Motley's USERRA claim,[1] the AJ noted that even if Mr. Motley met his initial burden of proving that his veteran status was a motivating or substantial factor in his termination, he would not be entitled to corrective action if the agency could demonstrate valid reasons for terminating him unrelated to his veteran status. See Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001). Turning to the parties' arguments, the AJ found that Mr. Motley's only evidence of anti-military bias consisted of alleged remarks by his supervisor that "the only reason we hired you was that you're a veteran," and "I wish you wouldn't mention that you are a veteran." According to the AJ, this evidence was insufficient to demonstrate that Mr. Motley's prior military service was a substantial or motivating factor in the agency's decision to terminate him. Furthermore, the AJ found that the agency had instead terminated Mr. Motley based solely on his performance deficiencies and disrespectful conduct. The AJ referenced the agency's termination notice, which cited various performance deficiencies, including Mr. Motley's failure to complete work assignments in a timely manner, his low scanned mail percentage relative to the office average, his refusal to comply with his supervisor's orders, and disrespectful email exchanges and arguments with his supervisor. Initial Decision at 6-7.

[1] On appeal, Mr. Motley appears to argue that the Board erred in dismissing his USERRA claim for lack of jurisdiction. However, that argument is clearly mistaken since the Initial Decision indicates that the AJ found Board jurisdiction over Mr. Motley's USERRA claim and adjudicated it on the merits.

In view of Mr. Motley's failure to demonstrate that his military service was a substantial or motivating factor for his termination, and the agency's legitimate reasons for terminating him, the AJ denied Mr. Motley's claim to corrective action under USERRA. The Initial Decision became the final decision of the Board when the Board denied Mr. Motley's petition for review. Final Decision. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

II

Pursuant to 5 U.S.C. § 7703(c), we must affirm the Board's decision unless we find it to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. See also Kewley v. Dep't of Health & Human Servs., 154 F.3d 1357, 1361 (Fed. Cir. 1998).

We find that the AJ's determinations regarding lack of jurisdiction and denial of relief under USERRA were both free of legal error and supported by substantial evidence. First, the AJ properly held that the Board lacked jurisdiction to hear Mr. Motley's termination appeal. Mr. Motley concedes that he was a probationary employee, because he was terminated during his probationary period as an Office Automation Assistant and could not credit his prior federal service since more than thirty days had elapsed between his prior and current positions. See 5 C.F.R. § 315.802(b). ("Prior Federal civilian service . . . counts toward completion of probation when the prior service . . . (3) Contains or is followed by no more than a single break in service that does not exceed 30 calendar days.") As a probationary employee, Mr. Motley had no statutory right to appeal, and could therefore establish Board jurisdiction only by alleging

that his termination was due to "partisan political or marital status discrimination." Stokes, 761 F.2d at 685. Mr. Motley did not pursue either of those avenues, and instead relied upon legally irrelevant allegations of discrimination based upon military service.

Second, the AJ properly held that Mr. Motley was not entitled to relief under USERRA. An employee making a discrimination claim under USERRA must initially prove by a preponderance of the evidence that his military service was a motivating or substantial factor in the adverse employment action. See Sheehan, 240 F.3d at 1013. If that initial burden is met, the agency must then establish by a preponderance of the evidence that it took the adverse action for valid reasons unrelated to the employee's veteran status. Id. As to the employee's initial burden, we agree with the AJ that Mr. Motley failed to demonstrate how his supervisor's allegedly discriminatory remarks against veterans were a substantial or motivating factor in his termination. Furthermore, we conclude that Mr. Motley's various performance deficiencies and disrespectful conduct, as described in the various agency documents detailed in the Initial Decision,[2] provide substantial evidence supporting the determination that Mr. Motley was terminated for performance reasons rather than his veteran status.

We remain unconvinced by Mr. Motley's various arguments raised on appeal. First, Mr. Motley contends that the agency never produced any evidence of

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[2] As set forth in the Initial Decision, Mr. Motley's production percentage in mail processing from January 2006 to June 2006 was only 77%, compared to the office average of 120%. Mr. Motley also refused to follow two specific orders by his supervisor to complete his scanned mail, that task was ultimately completed by a Technology Specialist. Finally, Mr. Motley acted disrespectfully in verbal encounters and inappropriate email exchanges with his supervisor. These factual findings were supported by various incident reports and memoranda of record submitted by the agency, all documenting Mr. Motley's lack of productivity and cooperation.

inappropriate emails sent by him to his supervisor. Next, he argues that the agency should have retained him in view of his significantly improved job performance.[3] Finally, Mr. Motley argues that his supervisor's derogatory remarks about the military should have been admitted as evidence of discriminatory intent. At the outset, we note that these arguments mention nothing of partisan political or marital status discrimination and are therefore irrelevant to Mr. Motley's termination appeal; accordingly, we consider them only with respect to his USERRA claim. In that capacity, Mr. Motley's arguments are unpersuasive in view of the applicable legal precedent and standard of review. As explained above, even assuming a discriminatory intent by Mr. Motley's supervisor, the agency demonstrated that his termination was due to various performance and attitude problems rather than his veteran status. Furthermore, Mr. Motley's assertions regarding his improved job performance and the agency's failure to produce evidence of his insubordinate emails are contrary to the Board's factual findings that he had indeed "failed to improve his production percentage in mail processing" and acted disrespectfully to his supervisor. These findings are supported by substantial evidence in the form of the various incident reports and memoranda of record submitted by the agency. We therefore see no reason to disturb them. Finally, we note that Mr. Motley's production percentage and disrespectful conduct were not the only reasons for his termination; he had also refused to follow two specific orders by his supervisor to complete his scanned mail. His arguments fail to address this independent basis for termination.

[3] Specifically, Mr. Motley contends that he increased his performance in scanned-mail percentage from 43% in January 2006 up to 126% in June 2006 and 100% at the time of his termination.

In sum, because the Board's determinations are both free of legal error and supported by substantial evidence, we affirm.

No costs.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WESLEY J. MOTLEY, III,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
CH-3443-06-0736-I-2

DATE: December 4, 2007

Wesley J. Motley, III, North Chicago, Illinois, pro se.

Shameera L. Carr, Philadelphia, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

WESLEY J. MOTLEY, III,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
CH-3443-06-0736-I-2

DATE: June 27, 2007

Wesley J. Motley, III, North Chicago, Illinois, pro se.

Deanna Leadingham, Great Lakes, Illinois, for the agency.

BEFORE
Kasandra C. Robinson
Administrative Judge

INITIAL DECISION

INTRODUCTION

Wesley J. Motley, III, filed an appeal of his probationary termination, claiming, among other things, that the agency's action violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). Because the appellant did not request a hearing, this decision is based on the parties' written submissions. For the reasons discussed below, the appellant's termination appeal is DISMISSED for lack of jurisdiction and his request for corrective action under USERRA is DENIED.

BACKGROUND

The agency hired the appellant on a career-conditional appointment to the position of Office Automation Assistant, GS-5, effective September 19, 2005. *See* Initial Appeal File (IAF), Tab 5, Subtab 4l. The appointment was subject to completion of a 1-year probationary period beginning that same date. *See id.* By memorandum dated July 13, 2006, Customer Service Department Director Myrna E. Marsh-Fuller, terminated the appellant's employment, effective July 14, 2006, based on his failure to carry out work assignments in a timely manner, failure to carry out a proper work assignment, and disrespectful conduct. *Id.*, Subtab 4d.

On August 10, 2006, the appellant filed an appeal with the Board in which he alleged his termination violated his rights under USERRA. In an initial decision issued October 26, 2006, the administrative judge dismissed the appeal without prejudice to allow the appellant an opportunity to pursue his USERRA claim with the Office of Special Counsel (OSC). *See Motley v. Department of the Navy*, MSPB Docket No. CH-3443-06-0736-I-1 (Initial Decision Oct. 26, 2006).

On May 7, 2007, the appellant refiled his appeal with the Board, following OSC's decision to close its inquiry into his complaint. *See* IAF, Tabs 1, 3. In his refiled appeal, the appellant alleged the agency retaliated against him because he filed an administrative grievance and his termination amounted to a violation of his rights under USERRA. *See* IAF, Tabs 1, 4.

ANALYSIS AND FINDINGS

The appellant has not established that the Board has jurisdiction over his termination appeal.

The appellant bears the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2) (2007). Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2) (2007).

An appellant may establish jurisdiction by showing that he is an "employee" under 5 U.S.C. § 7511(a)(1)(A). An employee is defined as an individual in the competitive service who is not serving a probationary or trial period under an initial appointment. 5 U.S.C.A. § 7511(a)(1)(A)(i) (West 2007); *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003). Prior service in competitive service positions can be credited towards completion of a later probationary or trial period in a competitive service position if the employee shows that: (1) The prior service was rendered immediately preceding the appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. *See Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 16 (2005).

According to an SF-50, the appellant's service computation date is May 26, 1991, *see* IAF, Tab 5, Subtab 4c, yet he was required to complete a probationary period upon his appointment to the Office Automation Assistant position. *See* IAF, Tab 5, Subtab 4l. Consequently, pursuant to the acknowledgment order, the appellant was ordered to file evidence and argument to establish the Board's jurisdiction over his appeal. *See* IAF, Tab 2.

In his written response, the appellant did not address the apparent discrepancy between his service computation date and his requirement to complete a probationary period in the Office Automation Assistant position. *See* IAF, Tab 4. During a June 14, 2007 status conference, the appellant indicated that, while he had previously performed several years of federal service, his current position with the agency was probationary because there was a break in service between his prior position and his appointment to the Office Automation Assistant position of more than 30 days. Thus, I find the appellant was a probationary employee at the time of his termination.

Where, as here, a probationary employee is terminated for post-appointment reasons, the Board has jurisdiction over the appeal under 5 C.F.R. § 315.806(b) only if the appellant makes a nonfrivolous allegation of discrimination based on partisan political reasons or marital status. *See Rhone v. Department of the Treasury*, 66 M.S.P.R. 257, 260 (1995). The regulation has consistently been interpreted as providing a very narrow exception to the non-appeal rights of probationary employees. *See Harris v. Department of Justice*, 25 M.S.P.R. 577, 580 (1985).

The Board's acknowledgment order advised the appellant of the specific requirements that he had to meet to establish the Board's jurisdiction over his probationary termination and provided him with the opportunity to file evidence and argument in that regard. *See* IAF, Tab 2. In response, the appellant stated that the Board had jurisdiction over his appeal under USERRA because the agency discriminated against him on account of his prior military service. *See* IAF, Tab 4. The appellant did not allege that his termination was based on marital status or partisan political discrimination. *Id.*

Thus, absent any evidence that the appellant's termination was the product of discrimination based on partisan political reasons or marital status, I find the appellant's appeal of his probationary termination must be dismissed for lack of jurisdiction. *See Rhone*, 66 M.S.P.R. at 260. Absent jurisdiction over the appellant's termination, the Board is also unable to adjudicate his affirmative defense of reprisal for filing an administrative grievance. *See Pulido v. Defense Logistics Agency*, 61 M.S.P.R. 145, 150 (1994).

The appellant has not shown that he is entitled to corrective action under USERRA.

In his appeal, the appellant alleged that an agency supervisor violated USERRA by making "severe and persuasive remarks." *See* IAF, Tab 1. Specifically, the appellant alleged that, during a January 9, 2006, meeting concerning his performance evaluation, a supervisor stated to him "the only

reason we hired you was that you're a veteran." *Id.* In another performance evaluation meeting on March 10, 2006, the appellant informed his supervisor that, as a veteran, he was proud to work with active-duty personnel. *Id.* The appellant alleged that his supervisor stated "I wish you wouldn't mention that you are a veteran." *Id.*

Under USERRA, the Board has jurisdiction over an appeal from "any person" alleging discrimination in Federal employment on account of military service. *See* 38 U.S.C.A. §§ 4303(4)(A)(ii), 4311(a), 4324(b) (West 2007). The requirements for establishing Board jurisdiction under USERRA are: (1) Performance of duty in a uniformed service of the United States; (2) an allegation of a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service. *See Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484 (Fed. Cir. 1998). Under USERRA, an individual's status as a member of the reserves qualifies as "service in the uniformed services." *See Tindall v. Department of the Army*, 84 M.S.P.R. 230, ¶ 11 (1999). Thus, based on these factors, I find the appellant has established the Board's jurisdiction over his USERRA claim.

An appellant making a claim of discrimination under USERRA bears the initial burden of showing, by a preponderance of the evidence, that his military service was at least "a substantial or motivating factor" in the adverse employment action. *See Fox v. U.S. Postal Service*, 88 M.S.P.R. 381, ¶ 9 (2001). An appellant may prove discriminatory motive or intent by either direct or circumstantial evidence. *See id.*

Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees

compared to other employees with similar work records or offenses. *See Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). In determining whether the employee has proven that his protected status was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the action taken. *See id.* In order to meet his burden of proof, the appellant must show evidence of discrimination other than the mere facts of his termination and membership in the protected class. *See id.* at 1015.

If the appellant shows that his military service was a motivating or substantial factor in the agency action, the agency then has the opportunity to come forward with evidence to prove, by a preponderance of the evidence, that it would have taken the action anyway, for a valid reason. *See Matz v. Department of Veterans Affairs*, 91 M.S.P.R. 265, ¶ 8 (2002). Even if the appellant meets his burden of proving that his military service was a motivating or substantial factor in his termination, he is not entitled to corrective action where the agency has proved that it would have terminated his employment in the absence of his military service. *See Fahrenbacher v. Department of Veterans Affairs*, 89 M.S.P.R. 260, ¶ 14, *aff'd sub nom. Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001).

Other than the comments the appellant attributed to his supervisor during meetings concerning his performance, the appellant has not provided any evidence that his prior military service was a motivating or substantial factor in the decision to terminate his employment. Rather, as further discussed below, the documentary record shows that the agency terminated the appellant's employment based solely on his performance deficiencies and disrespectful conduct.

According to the termination notice, the agency terminated the appellant's employment for his failure to carry out work assignments in a timely manner because he failed to improve his production percentage in mail processing from January 2006 to June 2006 after repeated counseling. *See* IAF, Tab 5, Subtab 4d.

Specifically, the appellant's scanned-mail percentage from January 2006 through June 2006 was only 77% compared to the office's average scanned-mail percentage during the same period of 120%. *Id.* The notice also indicates that the agency terminated the appellant's employment for his failure to carry out a proper work assignment. *Id.* Specifically, the office was in the process of testing new software for mail scanning. *Id.* All employees were instructed to give their scanned mail to a Technology Specialist to ensure scanning of the batches. *Id.* The appellant refused to follow two specific orders by his supervisor to complete his scanned mail. *Id.* Ultimately, the Technology Specialist completed the appellant's assignment to ensure the mail was scanned as required. *Id.* The notice further indicates that the agency terminated the appellant's employment because, on July 5, 2006, he became disrespectful to his supervisor by arguing with her during a discussion on the office's work schedules and by sending her inappropriate e-mails. *Id.*

In support of its termination action, the agency submitted an incident report from Head of Customer Relations Division Janice Mays, dated July 6, 2006, detailing the appellant's refusal to follow her orders to complete the scanned mail. *See* IAF, Tab 5, Subtab 4e. The agency also submitted a memorandum of record dated July 5, 2006, from the Head of the Customer Support Division Leanne Moore, concerning the appellant's disrespectful conduct in e-mail exchanges and in a discussion concerning the office's work schedule. *See id.*, Subtab 4f. Further, the agency submitted several memoranda of record from Ms. Moore concerning her discussions with the appellant about his poor productivity and the assistance she provided to him to help him meet the office's production standards from January 9, 2006 through May 31, 2006. *See id.*, Subtabs 4g, 4f, 4i, 4j, 4k.

In sum, I find the appellant has not shown that his prior military service was a substantial or motivating factor in the agency's decision to terminate his employment during his probationary period. The agency, in any event, has

established by preponderant evidence that its decision to terminate the appellant's employment was based on legitimate considerations, i.e., his demonstrated performance deficiencies and disrespectful conduct. Consequently, the appellant failed to prove any violation of his rights under USERRA, and corrective action therefore is not warranted.

DECISION

The appellant's appeal of the agency's action terminating him during his probationary period is DISMISSED for lack of jurisdiction, and the appellant's request for corrective action under USERRA is DENIED.

FOR THE BOARD:

Kasandra C. Robinson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **August 1, 2007**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX D

13 Jul 06

From: Department Director, Customer Service Department, Military Medical Support Office, Great Lakes
To: Mr. Wesley Motley III, Office Automation Assistant, GS-326-5, Customer Support Division, Customer Service Department, Military Medical Support Office, Great Lakes

Subj: DISCHARGE DURING PROBATIONARY PERIOD

Ref: (a) 5 CFR 315.804
(b) 5 CFR 315.806

1. On 19 September 2005, you were given a career conditional appointment as an Office Automation Assistant, GS-326-5, at the Military Medical Support Office, Great Lakes, Illinois, subject to the completion of a one (1) year probationary period. The probationary period serves as the final step of the examination process to determine an employee's fitness for retention in the federal service.

2. In accordance with the provisions of reference (a), you will be discharged from the rolls of this Activity effective tomorrow, 14 July 2006, for failure to carry out work assignments in a timely manner, failure to carry out a proper work assignment, and disrespectful conduct. Upon receipt of this letter, you are to collect your personal possessions, return all government property (Navy Identification Cards, keys, etc.,) in your possession to me, and leave the Naval Base. You will be carried in an administrative leave status through the remainder of the work week.

3. The specific reasons for your discharge are as follows.

a. Failure to carry out work assignments in a timely manner. On 9 January 2006, your immediate supervisor, Ms. Leanne Moore, Customer Service Supervisor, met with you to discuss your low production and told you that your work performance needed to improve. During the month of January 2006, you scanned 3579 batches and indexed 1552 batches, only 43% of your assigned batches. During the month of March 2006, you scanned 6349 batches and indexed 3882, for a total of 52%. Ms. Moore met with you again on 10 March 2006 to discuss your performance, and during the months of April, May and June, your production did improve. However, Ms. Moore has spent an inordinate amount of time monitoring your performance in order to improve your production. From January to June 2006, your percentage of scanned mail that has been indexed was 77%. The average percentage of scanned mail that has been indexed for your co-workers for this same period of time was 120%.

b. Failure to carry out a proper work assignment. Your immediate supervisor, Ms. Moore, was on leave from 22 to 26 May 2006. Ms. Janice Mays, Head, Customer Relations Division, was acting supervisor during that period. The Division was testing new software to update the scanning process and all employees were told to give all their scanning to Ms. Pamela Metallo, Information Technology Specialist, so she could ensure that these batches got scanned. You refused to do so. Ms. Mayes asked you why you did not give your work to Ms. Metallo and you told her that you were not done preparing the work for scanning. Ms. Mayes directed you to complete your work and give the scanning to Ms. Metallo. You failed to give your work to Ms. Metallo and Ms. Mayes and Ms. Metallo took the work off your desk the next day to ensure it was scanned as required.

c. Disrespectful conduct. On 5 July 2006, Ms. Moore met with you to discuss changes in the work schedule due to staff changes. She told you that when additional personnel are hired, the schedule will change again and she advised you that the tone of your emails regarding this subject were inappropriate and that as your supervisor, she is responsible for scheduling work. You were disrespectful to Ms. Moore by continuing to argue, so she told you that her decision was final and the discussion was over.

4. In accordance with reference (b), you may appeal your separation to the Merit Systems Protection Board (MSPB) if you allege it was based on (a) partisan political reasons (political affiliation) or marital status; or (b) race, color, religion, sex, national origin, sexual orientation, physical handicap or age, if such discrimination is raised in addition to (a) above. An appeal to MSBP must be filed no later than thirty (30) calendar days after the effective date of this action or thirty (30) calendar days after the date of receipt of this decision, whichever is later.

5. If you would like a copy of the MSPB regulations or if you have any questions concerning this action, you may contact Mr. Ralph Berginz, Human Resources Specialist, Building 27, at (847) 688-2222, extension 27.

Myrna E. Marsh-Fuller

MYRNA E. MARSH-FULLER

APPENDIX E

DD FORM 1 JUL 79 214 — PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

FROM ACTIVE DUTY

1. NAME (Last, first, middle)	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NO.
MOTLEY, WESLEY JONES III	NAVY-USN	319 | 52 | 1467

4a. GRADE, RATE OR RANK	4b. PAY GRADE	5. DATE OF BIRTH	6. PLACE OF ENTRY INTO ACTIVE DUTY
ABE3	E4	13 JUN 56	CHICAGO IL

1.329.216

7. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8. STATION WHERE SEPARATED
USS CARL VINSON CVN70 FPO NY 09558	USS CARL VINSON CVN70 FPO NY 09558

9. COMMAND TO WHICH TRANSFERRED	10. SGLI COVERAGE
COMMANDING OFFICER, NAVAL RESERVE PERSONNEL CENTER NEW ORLEANS LA 70149	AMOUNT $ 35,000 ☐ NONE

11. PRIMARY SPECIALTY NUMBER, TITLE AND YEARS AND MONTHS IN SPECIALTY (Additional specialty numbers and titles involving periods of one or more years)

ABE-0000/0000 X X X X X X X X X X X

12. RECORD OF SERVICE	YEAR(s)	MON(s)	DAY(s)
a. Date Entered AD This Period	81	FEB	26
b. Separation Date This Period	83	FEB	17
c. Net Active Service This Period	01	11	22
d. Total Prior Active Service	01	11	23
e. Total Prior Inactive Service	04	00	07
f. Foreign Service	00	00	00
g. Sea Service	01	02	28
h. Effective Date of Pay Grade	82	SEP	16
i. Reserve Oblig. Term. Date	N/A		

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

NONE X X X X X X X X X X X X X X X X

14. MILITARY EDUCATION (Course Title, number weeks, and month and year completed)

NONE X X X X X X X X X X X X X X X X

15. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	16. HIGH SCHOOL GRADUATE OR EQUIVALENT	17. DAYS ACCRUED LEAVE PAID
☐ YES ☒ NO	☒ YES ☐ NO	

18. REMARKS

X X X X X X X X X X X X X X X X X X X X X X X X

19. MAILING ADDRESS AFTER SEPARATION	20. MEMBER REQUESTS COPY 6 BE SENT TO IL DIR. OF VET AFFAIRS
11711 S JUSTINE CHICAGO IL 60643	☒ YES ☐ NO

21. SIGNATURE OF MEMBER BEING SEPARATED	22. TYPED NAME, GRADE, TITLE AND SIGNATURE OF OFFICIAL AUTHORIZED TO SIGN
Wesley J. Motley III	P. W. ARMBST PNCS USN ASSTPERSOFFICER BY DIR OF CO

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE (Includes upgrades)
DISCHARGED	HONORABLE

[redacted]

28. NARRATIVE REASON FOR SEPARATION INSUFFICIENT TIME REMAINING TO PERMIT RETENTION, BUT WITHIN THREE MONTHS OF EXPIRATION OF ENLISTMENT OR OBLIGATED SERVICE

29. DATES OF TIME LOST DURING THIS PERIOD	30. MEMBER REQUESTS COPY 4
IL-NONE	WJM (initials)

S/N 0102-LF-000-2140

TOTAL P.01